No. 14-6166

IN THE

Supreme Court of the United States

DAVID ANTHONY TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The Hobbs Act's plain text resolves this case. When a robbery occurs there can be no violation of the Hobbs Act unless (a) commerce is obstructed, delayed or affected or (b) the movement of an article or commodity in commerce is obstructed, delayed or affected by the robbery. The impact on commerce is an element of the offense that requires particularized evidence of an effect on interstate commerce beyond a reasonable doubt.

The very language of the Hobbs Act dictates that the government must show an effect on interstate commerce. The government argues that the robbery of a drug dealer whose drugs are subject to regulation pursuant to the Controlled Substance Act, is as a matter of law violative of the Hobbs Act. Adopting the government's argument, nothing other than the fact that that the victim is a "drug dealer" is required to prove the element of "effect on interstate commerce" required for a Hobbs Act violation.

The language of the Hobbs Act does not envision this limited showing. Unlike the Controlled Substance Act, which is a regulatory act, the Hobbs Act requires proof beyond a reasonable doubt of certain elements. The government's proof should have focused on the nature of the business, if any, robbed and how the robbery affected its operation in interstate commerce; that is to say, that both Worley and/or Lynch sold drugs from an out-of-state source and that the robbery of the money and drugs depleted the assets of their business.

A plain reading of the Hobbs Act suggests that the robbery of "any article or commodity" must affect

commerce in some manner. An article or commodity produced intrastate, may or may not have such an effect depending on other factors required to be shown.

The government seeks to expand its prosecutorial authority beyond what the text of the Hobbs Act can bear by creating a *per se* rule of guilt, an attempt the Court should reject by reversing the decision below. Such an expansion would transform every robbery and extortion which are quintessential state crimes, into federal offenses.

ARGUMENT

1. The Government Has No Answer to The Hobbs Act's Plain Text.

The plain text of the Hobbs Act requires the robbery of personal property from the person of another that affects commerce or the movement of an article or commodity in commerce. Proof of two elements are necessary for conviction (1) the property taken must affect commerce or the movement in commerce of the property taken is affected and (2) robbery of the person in possession of the property.

A. The Government's Attempts To Show The Evidence is Sufficient To Show That The Robberies Of Marijuana Dealers Affected Commerce For Hobbs Act Jurisdiction Fails.

During its case in chief the government presented testimony from seventeen witnesses, among them Special Agent Billy Cunningham ("SA Cunningham"), Bureau

Alcohol, Tobacco and Firearms ("ATF"), J.A.-A, p. 5a; Record 160, p. 41-46 and Record 161, p. 413-444; Officer Kenny Garrett ("Office Garrett"), Roanoke City Police Department, J.A.-A, p. 5a; Record 160, p. 58-77; Office Betsy Van Patton ("Office Patton"), Roanoke City Police, J.A.-A, p. 5a; Record 160, p. 123-161, all qualified as experts in the field of narcotics distribution. It is significant to note that at no time were either of these witnesses questioned regarding the origins and transportation of cocaine and/or marijuana into the Commonwealth of Virginia. There was no evidence produced from either of these experts from which the jury could find or infer that either of the two mentioned drugs were transported into the Commonwealth or in any way affected commerce.

SA Cunningham was questioned regarding his investigation and contacts with certain witnesses, victims and Taylor. He was never questioned regarding the origin of drugs, transportation, possession or sale of drugs. He was however questioned regarding an admission by one of the victims, W. T. Lynch , regarding a single drug transaction. The testimony was related to a single drug transaction involving $4,200 of which his wife had no knowledge. J.A.-A, p. 5a; Record 161, p. 443-444. Other than this one isolated transaction no other evidence was developed regarding drug dealing by Lynch, including but not limited to origin of drugs, quantity of drugs, cash, assets or the depletion of assets.

Office Garrett qualified as an expert regarding drug trafficking, drug trafficking trends, and drug prices as of 2009. J.A.-A, p. 5a; Record 160, p. 62. After being so qualified he testified that cocaine and marijuana were the most common drugs for sale on the streets of

Roanoke, Virginia. J.A.-A, p. 5a; Record 160, p. 63-64. He proceeded to testify concerning cocaine, the quantity, cost, repackaging for street sale and value. J.A.-A, p. 5a; Record 160, p. 64-68. Similar, but limited, testimony was offered regarding the sale and distribution of marijuana. J.A.-A, p. 5a; Record 160, p. 68-69. The government offered no evidence to support an interstate nexus for the Worley and Lynch robberies. No proof was offered by the government that the marijuana allegedly sold by the victims had originated out of state, that the victims themselves crossed state lines in conducting their business or that the robbery depleted assets that would have purchased goods in interstate commerce. Finally the government did not provide testimony of any kind about marijuana production or its origin. The government's answer to this failure is premised on the ability of a reasonable jury to "infer" the drugs in question crossed state lines. Gov. Br. 33. Additionally the government suggests that a reasonable jury could "infer" that "exotic" marijuana was not an in-state product but rather produced by specialized growers located in a State or foreign country with a favorable climate (Gov. Br. 36) or that "pounds of weed" would have been part of a bulk shipment containing marijuana brought into Virginia from another State or country. Gov. Br. 37. Each inference having no rational connection between the fact proven and the ultimate fact presumed.

This Court has concluded that "statutory presumptions cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Leary v. United States*, 395 U.S. 6, 33 (1969). *Tot v. United States*, 319 U.S. 463, 467-68

(statutory presumption could not be sustained if there [were] no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other [was] arbitrary because of lack of connection between the two in common experience). Granted this is not an issue of statutory presumption, however the Government's argument that the jury could infer that the victim drug dealers had engaged in commerce crossing state lines is subject to the same "rational connection" standard as set forth in *Leary, supra* and *Tot, supra*. When applied to the testimony at trial there were no underlying facts proven on which the jury could make a "rational" inference that the marijuana was transported interstate or in any way obstructed, delayed or affected commerce.

To further bolster its argument the government cites numerous cases supporting the depletions of assets theory to establish a Hobbs Act conviction. However, testimony in the cited cases, unlike the evidence here, established an interstate nexus supporting the Hobbs Act convictions. A review of the facts of some, but not all, the cited cases reveal the following:

United States v. Ossai, 485 F.3d 25, 30 (1st Cir. 2007) cert. denied, 552 U.S. 919 (2007). Testimony on direct examination that, had Ossai not stolen the $782, the funds would have been deposited in the owner's bank account the next day, and the owner would have used the deposited money to run the business, which necessarily required the ordering of products manufactured outside of New Hampshire.

United States v. Elias, 285 F.3d 183, 188 (2nd Cir. 2002). Evidence offered that Aybar Grocery sold beer produced outside the United States and fruit grown outside New York.

United States v. Urban, 404 F.3d 754, 762, (3rd Cir. 2005), cert. denied, 546 U.S. 1030 (2005). Evidence presented that defendants accepted tips from plumbers who purchased supplies made out-of-state, i.e. Pennsylvania.

United States v. Tillery, 702 F.3d 170, 174 (4th Cir. 2012), cert. denied, 133 S. Ct. 2369 (2013). In order to operate, Swan Dry Cleaners had to purchase most of its supplies from out-of-state; which included purchasing cleaning solvents from Illinois; hangers from Alabama, Mexico, Vietnam and China; spotting chemicals from Illinois and Missouri; gown boxes from Illinois; detergent from North Carolina; starch from Missouri; boiler conditioner from Illinois; and plastic garment bags from South Carolina.

United States v. Robinson, 119 F.3d 1205, 1208 (5th Cir 1997), cert. denied, 522 U.S. 1139 (1998). The robbery victims provided check-cashing services for out-of-state checks, payroll checks, and government benefit checks. Evidence presented that the stores sold products that had been shipped to Texas from other states.

United States v. Smith, 182 F.3d 452, 455 (6th Cir. 1999), cert. denied, 530 U.S. 1206 (2000). Testimony established that all the stores robbed by defendants dealt primarily, or at least significantly, in beer, wine, and cigarettes. ATF agents testified that tobacco and alcohol products, with few exceptions, are manufactured outside of Michigan and must be transported there for sale.

United States v. Dobbs, 449 F.3d 904, 908 (8th Cir. 2006), cert. denied, 549 U.S. 1139, and 549 U.S. 1233 (2007). Testimony from the representative from a wholesale supplier for the victim testified that most of the products his company sold to the victim were produced outside of Iowa. A beverage supplier's representative testified that the products his company supplied the victim were produced outside of Iowa. Movie rental records showed that many of the victim's customers were from outside Iowa.

United States v. Nelson, 137 F.3d 1094, 1102 (9th Cir. 1998), cert. denied, 525 U.S. 901 (1998). Evidence presented that the victims were commercial businesses actively engaged in interstate commerce at the time of the robberies. Testimony established that the victims conducted approximately 95 percent of their business with out-of-state firms. 90 percent of the merchandise sold by the victims was manufactured outside the state of California.

Each of the substantive robberies charged in the Indictment, for which Taylor stands convicted, involved only marijuana and drug proceeds from its sale. J.A. 11a-14a. The record clearly demonstrates that neither marijuana nor drug proceeds were obtained as a result of the robberies. The robbery at 3030 Parham Drive (Lynch Residence) netted a cell phone. J.A.-A, p. 5a; Record 161, p. 377. The robbery at 3343 Ridgerun (Worley Residence) netted $40, a cell phone, necklace and ring. J.A.-A, p. 5a; Record 160, P. 218-219. No estimate of value of the cell phones or jewelry were offered into evidence. Nor was it established that either the cell phones or jewelry had an affect on commerce. The government offered no evidence

and can point to no evidence suggesting a depletion of assets of either Lynch or Worley.

The government offered no evidence to support an interstate nexus for the home invasions. Both Lynch and Worley denied they were drug dealers at the time of the robberies. Lynch, unbeknownst to his wife, admitted to a one time sale of marijuana to investigators. J.A.-A, p. 5a; Record 161, p. 444-445. Worley admitted to a single marijuana transaction approximately 2 years prior to robbery and denied selling marijuana at any time thereafter. J.A.-A, p. 5a; Record 160, p. 173. A single isolated sale of drugs, removed in time for the alleged acts of Taylor is insufficient to support the conclusion that Lynch and/or Worley were engaged in the business of marijuana trafficking. Assuming arguendo that both Lynch and Worley were marijuana dealers, a point Taylor does not concede, the government presented no proof that the marijuana sold by the victims had originated out of state, that it was sold or intended to be sold to out-of-state customers, that Lynch or Worley themselves crossed state lines to conduct business, or that the robberies depleted assets that would have purchased commodities in interstate commerce. Similarly the government offered no proof as to how the robberies, if successful, might have affected the business enterprise. The government's proof is too lacking to establish the required interstate nexus. *United States v. Needham*, 604 F.3d 673 (2nd Cir. 2010), cert. denied, 562 U.S. 901 (2010).

More significantly, the government did not provide testimony of any kind about marijuana production and trafficking in Virginia. Like many legal products marijuana may be grown, processed and sold entirely within Virginia. *United States v. Peterson*, 236 F.3d 848,

855 (7th Cir. 2001) (finding that the government failed to demonstrate victim's marijuana trade involved drugs origination out of state and vacating Hobbs Act conviction). Reports documenting the frequency and scale of in-state marijuana production, often implicating thousands of dollars, are abundant.[1]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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1. *See, e.g.*, U.S. Drug Enforcement Administration, *Cannabis Eradication*, http://www.dea.gov/ops/cannabis.shtml (reporting the seizures in Virginia of more than 47,000 marijuana plants in 2010; 28,000 marijuana plants in 2011; 11,000 marijuana plants in 2012; 12,000 marijuana plants in 2013 and more than 11,000 marijuana plants in 2014); David Seidel, Assistant News Director WDBJ 7 Roanoke July 5, 2013 (reporting the seizure of 6,252 marijuana plants in Highlands County Virginia), http://www.wdbj7.com/news/local/highland-county-raid-nets-6353-suspected-marijuana-plants Evan Jones, WFIR News Radio, March 18, 2011 (reporting the seizure of 500 marijuana plants in Botetourt County, Virginia) http://wfirnews.com/local-news/1-5million-marijuana-bust-in-botetourt-county